

FILED

08 MAR 20 AM 11:58

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

1 STUART D. HIRSCH, ESQ. (SB #142641)
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3 Escondido, CA 92026
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6 Attorney for Plaintiff and Use Plaintiff,
7 PALOMAR GRADING AND PAVING, INC.

BY: *JAH* DEPUTY

8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 PALOMAR GRADING AND PAVING, INC., a)
11 California Corporation, and THE UNITED)
12 STATES OF AMERICA For The Use And)
13 Benefit Of PALOMAR GRADING AND)
14 PAVING, INC.)

Case No.: '08 CV 521 JAH WMC

COMPLAINT O a month if you F
PALOMAR GRADING AND PAVING,
INC. FOR:

13 Plaintiff,
14 vs.
15 WESTERN INSURANCE COMPANY and
16 CORNERSTONE BUILDING GROUP
17 Defendants.

1. PAYMENT BOND;
2. BREACH OF CONTRACT;
3. WORK AND LABOR;
4. CONVERSION; and,
5. INSURANCE BAD FAITH

BY FAX

18 PALOMAR GRADING AND PAVING, INC., respectfully alleges:

19 I.

20 FIRST CAUSE OF ACTION

21 (Payment Bond)

22 1. Jurisdiction in this cause is conferred by Title 40 of the United States Code, §270 (a) (b)
23 as amended, and by the Doctrine of Pendent Jurisdiction.

24 2. Palomar Grading and Paving, Inc. (hereinafter referred to as "PALOMAR") is, and at
25 all time herein mentioned was, a Corporation organized and existing under and by virtue of the laws
26 of the state of California and was and is duly licensed to perform the work of a contractor, and at all
27 times used only licensed subcontractors to perform the subject work.

28 3. PALOMAR is informed and believes, and based thereon alleges that Defendant Western

CR

1 Insurance Company, a California corporation, ("**WESTERN**") is and at all time herein mentioned
2 was, a business entity existing under and by virtue of the laws of the State of California, engaged
3 in the business of insurance in the State of California, and doing business in the State of California
4 as a corporate surety of bonds required by the United States of America and its various agencies.

5 4. Defendant Cornerstone Building Group (hereinafter referred to as "**CORNERSTONE**")
6 is, and at all times herein mentioned was, a Corporation licensed and existing under and by virtue
7 of the laws of the State of California, engaged in the construction business in California.

8 5. **PALOMAR** is informed and believes, and thereon alleges, that United States Navy is,
9 and at all relevant times was, the owner and/or reputed owner of an interest in the property known
10 as Smart Clinic, upon which the construction and actions that are the subject of this lawsuit were
11 being performed. (Hereinafter referred to as "**THE PROJECT**.")

12 6. On or about September 30, 2006, **CORNERSTONE** entered into a written contract
13 with the United States Navy, commonly referred to or identified as contract number N62473-06-G-
14 1035, Delivery Order 0020, for the construction or reconstruction of the facility which construction
15 is referred to herein as **THE PROJECT**.

16 7. Thereafter, **CORNERSTONE** as principal and **WESTERN** as surety duly executed,
17 obtained or issued a payment Bond dated on or about October 6, 2006 pursuant to and in accordance
18 with the provisions of Title 40 of the United States Code, section 270(a), in the total amount of
19 \$569,902.00 (hereinafter referred to as the "**BOND**").

20 8. The **BOND** guarantees, jointly and severally, payment of persons supplying labor and
21 material for the prosecution of the construction work at **THE PROJECT**. As required, in the
22 **BOND** was presented or delivered to the United States of America, and accepted by it, thereby
23 guaranteeing payment for those supplying labor and materials on **THE PROJECT** such as
24 **PALOMAR**.

25 9. **CORNERSTONE** created a written contract that was dated October 6, and signed by
26 **PALOMAR** November 3, 2006, in regard to the renovation operations at the **PROJECT**. In
27 addition to the original written contract, **PALOMAR** and **CORNERSTONE** entered various written
28 change orders and other agreements that should have been the subject of written change orders in

1 relation to additional work or services. (Hereinafter collectively referred to as the "CONTRACT.")

2 10. Pursuant to the **CONTRACT**, **PALOMAR** furnished labor and materials for the works
3 of improvement at **THE PROJECT**. Except to the extent prevented or excused, **PALOMAR** has
4 satisfactorily completed all of its obligations under the **CONTRACT**.

5 11. As a result of the completion of **PALOMAR**'s portion of the work at **THE PROJECT**,
6 **CORNERSTONE** became indebted to **PALOMAR** in the amount of \$175,080.70 or an amount
7 that will be the subject of proof at the time of trial, which amount exceeds the Jurisdictional
8 requirements of the Court. **CORNERSTONE** received payment in full for its contract amount and
9 actually received payment from the United States Navy for the work of **PALOMAR**, which is the
10 subject of this lawsuit. **PALOMAR** is informed and believes that **CORNERSTONE** obtained
11 payment from the Navy for the work of **PALOMAR** by representing or agreeing that it would pay
12 **PALOMAR**. **CORNERSTONE** has subsequently retained the sums provided to it by the Navy for
13 the work of **PALOMAR** and **CORNERSTONE** has continued to fail or refuse to pay **PALOMAR**
14 the sums that are owed.

15 12. **PALOMAR** was required to and did file a Bond Claim with **WESTERN** in relation to
16 the **BOND** in accordance with or pursuant to the Miller Act, for the amounts constituting the value
17 of the services and the materials that **PALOMAR** provided at **THE PROJECT**. That Bond Claim
18 was denied and the subject amounts remained unpaid at the time this action was filed

19 13. The Defendants collectively have failed to pay **PALOMAR** for the labor and materials
20 furnished by **PALOMAR** at **THE PROJECT**, which amount is currently \$175,080.70 exclusive
21 of interest, attorney's fees and court costs. Additionally, **PALOMAR** has suffered lost business
22 opportunities, lost interest on the sums wrongfully retained and/or has suffered other economic or
23 consequential damages through the actions of the Defendants. **PALOMAR** is informed and believes
24 that the retention of the funds by **CORNERSTONE** was or is intentional and/or otherwise amounts
25 to conversion.

26 14. Having failed and refused to pay **PALOMAR**, notwithstanding **PALOMAR**'s multiple
27 demands, there is now due, owing, and unpaid to **PALOMAR** the amount of \$175,080.70 or an
28 amount that will be proven at the time of trial, plus consequential damages, interest, attorney's fees

1 and costs according to proof.

2 15. PALOMAR has retained attorneys, duly licensed to practice law before all of the courts
3 of the State of California, as their attorneys of record herein, and has incurred the obligation to pay
4 its attorneys a reasonable attorney's fee, and is entitled to recover those fees from the Defendants
5 in accordance with an agreement, pursuant to the Federal Acquisition Regulations, pursuant to other
6 laws of the United States of America or pursuant to laws of the State of California.

7 16. As a further, direct, proximate and legal result of the conduct of the Defendants, as
8 alleged herein, PALOMAR has been damaged by, among other things, having been induced to
9 expend or having been deprived of the use of substantial sums of money in an amount that, from
10 time to time, was in an amount certain or an amount capable of being determined by reasonable
11 calculation, thereby entitling PALOMAR to prejudgment interest pursuant to the Federal
12 Acquisition Regulations and/or California Civil Code section 3287. Alternatively, PALOMAR is
13 entitled to interest as a result of this dispute involving construction of improvements to property
14 pursuant to an agreement, pursuant to the Federal Acquisition Regulations, pursuant to other laws
15 of the United States of America or pursuant to laws of the State of California.

16 II.

17 SECOND CAUSE OF ACTION

18 (Breach of Contract)

19 17. PALOMAR re-alleges and incorporates by reference each and every allegation of the
20 above paragraphs 1 through 16, inclusive, as if fully set forth herein.

21 18. PALOMAR has performed all conditions, covenants and promises required on its part
22 to be performed in accordance with the terms and conditions of the CONTRACT, except those
23 which have been permitted or excused by the actions and conduct of CORNERSTONE, or its
24 agents and representatives.

25 19. CORNERSTONE has breached the CONTRACT by failing and refusing to pay to
26 PALOMAR the principal sum of \$175,080.70

27 20. As a proximate result of the above described breach of contract, PALOMAR has been
28 damaged in the principal sum of \$175,080.70 together with interest according to proof.

1 constitutes conversion. In this regard, **PALOMAR** is informed and believes that
2 **CORNERSTONE** intentionally engaged in the conduct or abstained from taking action to cause
3 **PALOMAR** to be deprived of the subject sums.

4 27. As a direct, proximate and legal result of the conduct set forth herein, **PALOMAR** has
5 been damaged by, among other things, having been caused to lose substantial sums of money in
6 relation to the said sums wrongfully taken, having been deprived of money spent to replace the said
7 sum wrongfully taken, and other economic and/or consequential damages in a total amount that will
8 be demonstrated according to proof at the time of trial.

9 28. As a further, direct, proximate and legal result of the conduct, as set forth herein,
10 **PALOMAR** has been damaged by, among other things, having been caused to expend substantial
11 sums of money for attorney's fees, attorney's costs and other litigation costs which are recoverable
12 pursuant to an agreement, or pursuant to the Federal Acquisition Regulations, pursuant to other laws
13 of the United States of America or pursuant to laws of the State of California.

14 29. As a further, direct, proximate and legal result of the conduct of the **DEFENDANTS**, as
15 alleged herein, **PALOMAR** has been damaged by, among other things, having been induced to
16 expend or having been deprived of the use of substantial sums of money in an amount that, from
17 time to time, was in an amount certain or an amount capable of being determined by reasonable
18 calculation, thereby entitling **PALOMAR** to prejudgment interest pursuant to the Federal
19 Acquisition Regulations, other laws of the United States of America or California Civil Code section
20 3287. Alternatively, **PALOMAR** is entitled to interest as a result of this dispute involving
21 construction of improvements to property.

22 30. The conduct alleged in this cause of action was despicable and was done with a conscious
23 disregard of **PALOMAR**'s rights or with the intention of depriving **PALOMAR** of rights, or
24 otherwise constituting oppression, fraud or malice under California Civil Code section 3288, thereby
25 entitling **PALOMAR** to prejudgment interest in the discretion of the jury.

26 31. The conduct a alleged in this cause of action, was despicable and was done with a
27 conscious disregard of **PALOMAR**'s rights or property or with the intention of depriving
28 **PALOMAR** of rights or property, or otherwise constituting oppression, fraud or malice under

1 California Civil Code section 3294, thereby entitling **PALOMAR** to punitive or exemplary damages
2 in an amount sufficient to punish or set an example of the defendants.

3 V.

4 **FIFTH CAUSE OF ACTION**

5 **(Insurance Bad Faith)**

6 32. **PALOMAR** re-alleges and incorporates by reference each and every allegation of the
7 above paragraphs 1 through 31, inclusive, as if fully set forth herein.

8 33. **WESTERN**, as surety and insurer for others, having undertaken to provide **PALOMAR**
9 with certain coverage, guaranties or warranties of payment, was under a duty implied by law to act
10 fairly and in good faith while investigating or evaluating bond claims such as that which is the
11 subject of this action. **WESTERN** has breached the above-described duty in that it unreasonably
12 and without proper cause filed and/or refused to investigate or evaluate the claim and failed to pay
13 **PALOMAR**. Additionally, **WESTERN** unreasonably delayed providing its explanation and refusal
14 to make payments to Palomar, notwithstanding **PALOMAR**'s multiple demands, and there is now
15 due, owing, and unpaid an amount that will be proven at the time of trial, plus consequential
16 damages, interest, attorney's fees and costs according to proof.

17 34. **PALOMAR** performed all conditions, covenants and promises, including giving proper
18 notice of said claim to **DEFENDANTS**, required on its part to be performed, except those which
19 have been permitted or excused by the conduct of **WESTERN**, **CORNERSTONE** or their agents
20 and representatives.

21 35. As a direct, proximate and legal result of the conduct of the Defendants, as set forth
22 herein, **PALOMAR** has been damaged by, among other things, having been caused to lose
23 substantial sums of money in relation to the above-described unpaid sum, having been deprived of
24 money wrongfully taken or withheld by the Defendants and other economic and/or consequential
25 damages in a total amount that will be demonstrated according to proof at the time of trial; however,
26 the amount of damage suffered exceeds the jurisdictional requirements of this Court.

27 36. As a further, direct, proximate and legal result of the conduct of the **DEFENDANTS**, as
28 set forth herein, **PALOMAR** has been damaged by, among other things, having been caused to

1 expend substantial sums of money for attorney's fees, attorney's costs and other litigation costs
2 which are recoverable pursuant to an agreement, pursuant to the Federal Acquisition Regulations,
3 pursuant to the laws of the United States of America or pursuant to laws of the State of California.

4 VI.

5 PRAYER FOR RELIEF

6 WHEREFORE, PALOMAR prays for or requests judgment as follows:

7 ON ALL CAUSES OF ACTION

- 8 1. For the principal sum of \$175,080.70;
9 2. For interest thereon at the maximum legally permissible rate from and after a date
10 according to proof;
11 3. For costs of suit, expert witness fees and attorney's fees according to proof at the time
12 of trial.
13 4. For reasonable attorney's fees; and
14 5. For such other and further relief as the Court may deem just and proper.

15 ON THE FOURTH AND FIFTH CAUSES OF ACTION


- 16 1. For punitive or exemplary damages in an amount sufficient to punish or set an example
17 of the Defendants.

18 VII.

19 JURY TRIAL DEMAND

20 PALOMAR hereby formally requests to have a trial by jury in relation to the causes of action
21 and the issues that are properly the subject of such a trial.

22
23 March 11, 2008

By: 
STUART D. HIRSCH, ESQ.
Attorney for Plaintiff,
PALOMAR GRADING AND PAVING, INC.

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

148979 - SH

**March 20, 2008
12:04:28**

Civ Fil Non-Pris

USAO #.: 08CV0521

Judge.: JOHN A HOUSTON

Amount.:

\$350.00 CK

Check#.: BC004658

Total-> \$350.00

FROM: PALOMAR GRADING AND PAVING INC
V. WESTERN INS CO ET AL

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Palomar Grading and Paving, Inc.

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Stuart D. Hirsch, 2150 N Centre City Parkway, Escondido, CA 92026

DEFENDANTS

Western Insurance Company and Cornerstone Building Group

CLERK, U.S. DISTRICT COURT
County of Residence of First Listed Defendant OF CALIFORNIA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED. DEPUTY.

Attorneys (If Known)

'08 CV 521 JAH WMC

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> CONTRACT	<input type="checkbox"/> TORTS	<input type="checkbox"/> FORFEITURE/PENALTY	<input type="checkbox"/> BANKRUPTCY	<input type="checkbox"/> OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input checked="" type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property				

V. ORIGIN

- (Place an "X" in One Box Only)
- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
40 USC 3133

Brief description of cause:

Miller Act Bond Claim and related causes for non payment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$**
175,080.70

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

03/11/2008

SIGNATURE OF ATTORNEY OF RECORD

Stuart D. Hirsch

FOR OFFICE USE ONLY

RECEIPT # 145979 AMOUNT \$350

APPLYING IFP

JUDGE

MAG. JUDGE

See 3/19/08

BY FAX